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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CMG BRANDS LLC, Plaintiff and Appellant, v. STOP STARING! DESIGNS LLC et al., Defendants and Respondents.	B234118 (Los Angeles County Super. Ct. No. BC431713)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth Allen White, Judge. Affirmed.

One and Christopher W. Arledge for Plaintiff and Appellant.

Browne George Ross, Peter W. Ross, Keith J. Wesley, and Lori Sambol Brody for Defendants and Respondents.

Clothing manufacturer Stop Staring!, Designs and its principal, Alicia Estrada (collectively, "Stop Staring!") made and sold dresses with product codes incorporating the phrase, "bdavis." CMG Brands, ("CMG"), the company that negotiates licensing deals involving the publicity rights of the deceased actress Bette Davis on behalf of her estate and heirs, sued Stop Staring! under Civil Code[1] section 3344.1. After Stop Staring! challenged CMG's standing to sue, CMG dismissed the action without prejudice, then refiled the action, adding Davis's estate and heirs as plaintiffs. The trial court awarded Stop Staring! attorney fees as the prevailing party in the first action. CMG appeals, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Under section 3344.1, CMG sued Stop Staring! in 2010 for infringement of Davis's right to publicity based on Stop Staring!'s use of Davis's name in conjunction with vintage-inspired clothing and related advertising. Later that year, Stop Staring! moved for summary judgment on four grounds: first, that the undisputed evidence demonstrated that it had not used Davis's name, voice, signature, photograph or likeness and had therefore not violated section 3344.1; second, that CMG lacked standing to bring the action because it did not own any interest in Davis's publicity rights and had not registered a claim to those rights with the Secretary of State prior to suit; third, that the cause of action was time-barred; and fourth, that the litigation was barred by the doctrine of incidental use.

As a result of the standing argument in the summary judgment motion, CMG sought to amend its complaint to add as new plaintiffs the estate and heirs of Bette Davis. The trial court denied the motion without prejudice on the basis that the formal requirements for a motion to amend had not been met.

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[1] All further statutory references are to the Civil Code unless otherwise indicated.

Before the summary judgment motion was heard, CMG dismissed the action without prejudice. It then filed a new action asserting the same claim, but with Davis's estate and heirs named as plaintiffs as well. The new action was partially resolved when Stop Staring! accepted the new plaintiffs' offer to compromise; CMG was not a party to that offer.

Stop Staring! requested attorney fees and costs in the first action. The court ordered CMG to pay Stop Staring! costs of $2,325 and attorney fees of $118,518.75. CMG appeals.

DISCUSSION

CMG contends that the trial court erred when it awarded attorney fees under section 3344.1 to Stop Staring! as the prevailing party when Stop Staring! obtained only a dismissal without prejudice in this action and ultimately paid damages and accepted an injunction in the later-filed matter. Section 3344.1, subdivision (a)(1) entitles the "prevailing party or parties in any action under this section . . . to attorney's fees and costs." The section does not define the term "prevailing party"; however, the term has been interpreted, when used in the very similar section 3344, as requiring the trial court to analyze "'which party had prevailed on a practical level.' [Citation.]" (*Gilbert v. National Enquirer, Inc.* (1997) 55 Cal.App.4th 1273, 1277 (*Gilbert*), quoting *Heather Farms Homeowners Assn. Inc. v. Robinson* (1994) 21 Cal.App.4th 1568, 1574.) "In making that determination, the critical issue is which party realized its objectives in the litigation." (*Coltrain v. Shewalter* (1998) 66 Cal.App.4th 94, 107 (*Coltrain*); see also *Santisas v. Goodin* (1998) 17 Cal.4th 599, 622.) We review the determination of the prevailing party for an abuse of discretion. (*Gilbert, supra,* at p. 1277.)

We find no abuse of discretion here. The trial court reasonably considered Stop Staring! to have prevailed in the instant matter when CMG dismissed the action in response to the summary judgment motion. Stop Staring! put an end to this suit, successfully attaining its objective in the litigation, when the action against it was

dismissed. Moreover, the court noted, the sequence of events in the litigation suggested that CMG dismissed the action because Stop Staring!'s summary judgment motion was meritorious in terms of the standing issue. Although the court acknowledged that the other action had been filed and partially resolved through the accepted offer to compromise, the court found that other suit irrelevant: CMG was not a party to the offer to compromise and CMG had not, as of that date, prevailed in the later-filed litigation. As a practical matter, therefore, the court concluded that Stop Staring! was the prevailing party in the instant action and was entitled to attorney fees.

CMG contends that the dismissal is not "a defeat of any kind" because the matter could be refiled. While CMG is right that Stop Staring! could be (and was) again plunged into litigation with the filing of another action, the dismissal nonetheless terminated the instant litigation and rendered Stop Staring! no longer subject to liability on this complaint. CMG argues that Stop Staring! cannot be considered the prevailing party because the voluntary dismissal was not a reflection of the merits of its case, but neither the statute nor related case law requires that the resolution of the action be merits-based for it to represent the accomplishment of a litigation objective. CMG discusses the concept of "winning" extensively, arguing that the dismissal was not a "win," but from a defendant's perspective it is a victory for a suit to come to an end without an unfavorable judgment. "Since the defendant's goal is to make the plaintiff go away with its tail between its legs, ordinarily the prevailing party will be the defendant" when a plaintiff voluntarily dismisses the action while a potentially dispositive motion is pending. (*Coltrain*, *supra*, 66 Cal.App.4th at p. 107 [discussing voluntary dismissal of an action while a special motion to strike is pending].)

CMG argues that under *Stokus v. Marsh* (1990) 217 Cal.App.3d 647 (*Stokus*), a fee determination should properly have been left until after the conclusion of the second action. In *Stokus*, a first unlawful detainer action ended when the defendant successfully moved to quash service of summons, and then the plaintiff dismissed his second unlawful detainer action when a question arose over the technical sufficiency of the notice of eviction. (*Id.* at pp. 650-651.) After the plaintiff prevailed in his third action, the court

awarded fees under section 1717 that encompassed work done in the prior actions because the work done in the earlier litigation—issue evaluation, discovery, trial preparation, and preparation of jury instructions and a trial memorandum—was essential to achieve the ultimate victory in the final suit. (*Id*. at p. 654.) The *Stokus* court affirmed the award, concluding that a later fee award may encompass work in earlier, dismissed litigation (*id*. at pp. 654-656), but the court was not called on in that case to consider the propriety of awarding fees in the earlier, dismissed litigation. Cases are not authority for principles not considered. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372.) CMG has not established any error here.

Finally, CMG argues in its reply brief that the trial court erred in considering CMG a separate entity from the estate and heirs of Bette Davis, the additional plaintiffs who filed the second action. CMG contends that it had a unity of interest with the added plaintiffs and that it therefore should be considered to have prevailed in the second action despite not being a party to the offer to compromise in that action. The concept of a unity of interest originated in the cost provisions of a former version of Code of Civil Procedure section 1032. It provided a mechanism in multi-defendant cases for holding nonliable defendants responsible for a portion of the costs because they were closely aligned with a losing defendant. (7 Witkin, Cal. Procedure (5th Ed. 2008) Judgment, § 94, pp. 633-634; see also *Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 984, disapproved on other grounds in *Goodman v. Lozano* (2010) 47 Cal.4th 1327 [nonliable defendant wife not a prevailing party where her defendant husband was found liable].) Section 1032, however, was repealed in 1986 and replaced by a new version of the costs statute that no longer granted courts discretion to deny costs to a prevailing party based on its unity of interest with a losing defendant. (*Id.* at p. 1335.) We need not determine here whether the unity of interest principle remains viable after these amendments. Even if we assume it to have survived repeal and the enactment of a new Code of Civil Procedure section 1032, we are not aware of any statutory or decisional law, nor has CMG cited any, taking the unity of interest principle out of the context of defendants with unified interests and applying it to convert a plaintiff who has not been awarded a

recovery into a prevailing party based on its position as a business affiliate of the plaintiffs who received a recovery in another action. Here, CMG may not have had standing to pursue this litigation on its own—the question does not appear from this record ever to have been resolved—and it was not among the parties involved in the later compromise of the dispute. Nothing in the unity of interest principle suggests that the later favorable resolution of the dispute with parties with undisputed standing can somehow transform CMG into a prevailing party in earlier, abandoned litigation simply because CMG receives proceeds when it negotiates licensing deals on behalf Davis's estate and heirs. CMG has not established error here.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.